U. S.

FEB 1

No. 73-1038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

APPALACHIAN POWER COMPANY,
INDIANA & MICHIGAN ELECTRIC CO.,
KENTUCKY POWER COMPANY,
OHIO POWER COMPANY,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE IN BEHALF OF EDISON ELECTRIC INSTITUTE

CAMERON F. MACRAE
LEBOEUF, LAMB, LEIBY & MACRAE
One Chase Manhattan Plaza
New York, New York 10005
Attorney for
Edison Electric Institute

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BRIEF AMICUS CURIAE IN BEHALF OF EDISON ELECTRIC INSTITUTE

In accordance with this Court's Rule 42, Edison Electric Institute has received the written consent of counsel for the government and counsel for the petitioners to file this brief amicus. Copies of the consents have been filed with the Clerk of the Court.

Interest of Amicus Curiae

Edison Electric Institute ("EEI") is the principal national association of electric utility companies, having as

members 193 operating companies which supply electricity to 77 percent of all the electric service customers in the United States.

Edison Electric Institute is committed to protecting the nation's air quality, particularly with regard to the effect of generating plant emissions on the public health. It is much concerned that the decisions below do not permit the industry to implement an existing available technology (that is, tall stack technology) and will seriously compromise the ability of the electric utility industry and the nation to achieve compliance in the shortest possible time with primary and secondary air quality standards[1] adopted heretofore by the Administrator of the Environmental Protection Agency ("EPA"). With but a single exception,[2] the ruling below[3] upholds the lawfulness of a decision of EPA, pursuant to Section 111 of the Clean Air Act of 1970,[4] promulgating performance standards[5] predicated upon the use of stack gas desulfurization equipment for new or modified fossil fuel fired steam generating units of commercial size.

Edison Electric Institute is particularly concerned because it believes that adoption of the performance standards by EPA will jeopardize unnecessarily the capability of the electric utility industry to construct[6] and thereafter

1. 40 C.F.R. §50.4 (1973).

2. The court below remanded the matter to EPA for further proceedings on the environmental problems of disposing of the sludge by-product of lime slurry scrubbing systems.

3. Essex Chemical Corporation *et al. v.* Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973). The opinion of the Court of Appeals is reprinted in the Appendix of Petitioner's Petition, at App. 1a-26a.

4. 42 U.S.C. §1857c-6 (Supp. II, 1970). Hereinafter the "Clean Air Act of 1970" will be referred to as merely the "Clean Air Act".

5. 40 C.F.R. §60.43 (1973).

6. Construction of new sources and modification of existing sources are subject to review pursuant to 40 C.F.R. §51.18 (1973).

operate[7] additional generating facilities which must be completed if the electric utility industry is to be in a position to supply the nation with its energy needs. The Federal Power Commission estimates that present generating plant capability will have to be doubled in this decade and almost doubled again in the 1980's.[8] A very substantial portion of that capacity will be conventional steam electric generating capability.

Edison Electric Institute estimates that approximately 119 million kilowatts of fossil fuel fired steam electric generating capability will be added during the six year period 1973-1978; much of which will be required to comply with the performance standards adopted by EPA pursuant to Section 111 of the Clean Air Act. Additionally, in order to respond to present and anticipated shortages of low sulfur residual fuel oil, many existing plants, perhaps as many as 84 plants with a total generating capability of 24 million kilowatts,[9] may need to be converted to burn coal. It is entirely probable that such conversions may entail a "modi-

7. Operation of a fossil fuel fired electric generator outside the EPA performance standards subjects the violator to the risk of: (1) injunctive action by EPA; (2) a fine of $25,000 per day of violation or imprisonment for up to one year, or both; and (3) civil suit by any citizen. 42 U.S.C. §§1857c-8(b), (c) (Supp. II, 1970) and 1857h-2 (1970).

8. FPC, 1970 National Power Survey, pt. I, at I-1-17 (1971).

9. The White House and various regulatory agencies have identified a substantial number of plants which may be reconverted to coal. ELECTRICAL WEEK, November 19, 1973, at 8. Additionally, William E. Simon recently dispatched a telegram to 19 East Coast utilities urging rapid conversion of 26 power plants from oil to coal as "imperative and in the national interest." ELECTRICAL WEEK, December 10, 1973, at 1. *See also*, FPC, The Potential for Conversion of Oil-Fired and Gas-Fired Electric Generating Units to Use of Coal, (FPC Form No. 36), Bureau of Power, Revised (Nov. 6, 1973).

fication"[10] of such plants if long-term conversions to coal must be made, with a concomitant legal obligation to put such plants in compliance with the performance standards adopted by EPA pursuant to Section 111 of the Clean Air Act.

The electric utility industry is already beset with many complex financial and environmental[11] problems. The performance standards for new fossil fuel fired steam generators adopted by EPA are certain to complicate even more and perhaps jeopardize the capacity of the electric utility industry to respond in the short term to the "energy crisis" (which to date has been characterized by very substantial shortages[12] of residual fuel oil and skyrocketing fuel costs) and in the long term to bring on line badly needed additional generating capability.

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10. Performance standards apply to a "stationary source, the construction or modification of which is commenced after the publication of regulations . . . which will be applicable to such source." Clean Air Act, Section 111(a) 2, 42 U.S.C. §1857c-6(a) (2) (1970).

11. *See for example*, Sierra Club *v.* Ruckelshaus, 344 F.Supp. 253 (D.D.C. 1972), *aff'd, without opinion*, 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd*, Fri. *v.* Sierra Club, 412 U.S. 541 (1973); *and see*, the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1151 *et seq.*, Pub.L.92-500, 86 Stat. 816 (Oct. 18, 1972).

12. The Emergency Petroleum Allocation Act of 1973, Pub.L.No. 93-159, 87 Stat. 627, 628 (Nov. 27, 1973) sets forth the Congressional findings with regard to the shortage of residual fuel oil. Congress determined that, "(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent; (2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and (3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government."

The alternatives through which the electric utility industry may do its part to assist in achieving the national primary and secondary air quality standards adopted by EPA are few in number. In the long term the remaining hydro-electric sites may be developed but, as is well known, most such sites have been developed. Construction of many additional nuclear plants offers a real solution to current air quality problems, but the nation's escalating energy demands are so great that additional nuclear facilities cannot be considered as the sole future source of electric energy even in the distant future. Accordingly, much of the capacity for energy production will have to depend upon available fossil fuels.

With respect to power plants utilizing fossil fuels, there are but four possible methods available to achieve compliance with primary and secondary air quality standards heretofore adopted by EPA. Of these, only three methods presently can be applied to new and modified plants to secure compliance with the EPA Section 111 performance standards.

1. Many existing power plants can utilize fossil fuels with low sulfur content. Although this approach appears possible in some applications, it is not available for all plants, because of the scarcity of low sulfur fuel oil and coal, and because of the specific prohibition from converting to such fuels by Federal regulation.[13]

13. EPA, National Public Hearing on Power Plant Compliance with Sulfur Oxide Air Pollution Regulations: Report of The Hearing Panel (Jan. 1974) (hereinafter cited as, *Report of The EPA Hearing Panel*). The Report notes that "supplies of low sulfur fuels are limited and will not be sufficient to permit all noncomplying power plants to meet emission requirements," at 1. *Also see*, 38 Fed. Reg. 32577 (Nov. 27, 1973) which sets forth Federal regulations which limit sources from converting to low sulfur fuel.

2. Electric utilities can construct very tall stacks which disperse emissions with the result that ambient air quality standards could be met at many existing as well as new and modified plants[14] within the time schedules established by Congress in Section 110(a)(2) of the Clean Air Act.[15]

3. It is hoped that systems can be developed to remove sulfur from available fuels, but such technology does not presently exist in the case of coal and, in the case of oil, it cannot be applied in sufficient amounts to refineries in the near term. As a result, most people are convinced that this approach cannot be counted on until the 1980's.[16]

4. Finally, systems may be developed to remove sulfur oxides from stack gases but such systems do not yet exist for commercial applications, despite expenditures by the electric utility industry of more than 300 million dollars on research.[17] In any event, it cannot be applied to existing coal plants impacting on primary standards, or to new coal fuel plants because of vendor capacity constraints within

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14. *See,* Prepared Statement of W. Donham Crawford, President, Edison Electric Institute, Before the Environmental Protection Agency Stationary Source Enforcement Proceedings, at 4, 6, 7 (Oct. 23, 1973); *and see,* Prepared Statement of A. V. Slack, Tennessee Valley Authority, Before the Environmental Protection Agency Stationary Source Enforcement Proceedings (1973).

15. 42 U.S.C. §1857c-5(a)(2) (1970).

16. *See,* Prepared Statement of W. Donham Crawford, President, Edison Electric Institute, Before the Subcommittee on Public Health and Environment, House of Representatives Interstate and Foreign Commerce Committee, at 7 (Sept. 20, 1973); *also see,* Report of The EPA Hearing Panel, at 3 (n. 14, *supra*).

17. *See,* Prepared Statement of W. Donham Crawford, *supra,* n. 16. *Also see,* Prepared Statement of W. Donham Crawford, President, Edison Electric Institute, Before the Environmental Protection Agency Stationary Source Enforcement Proceeding, at 5 (Oct. 23, 1973).

the time schedules contemplated by Section 110 or 111 of the Clean Air Act.[18]

Reasons for Granting a Writ of Certiorari

Edison Electric Institute believes that a Writ of Certiorari should be granted because (1) the decision below does not reflect the type of thorough, probing, in-depth review of EPA's action in promulgating performance standards for fossil fuel steam generators contemplated by this Court's decision in *Citizens to Preserve Overton Park Inc.* v. *Volpe;*[19] and (2) the obligation of EPA to comply with Section 102(2) of the National Environmental Policy Act of 1969[20] should be clarified as should the reviewability of decisions made by EPA which so substantially affect the environment, the economy and the capacity of the electric utility industry to continue to supply energy in the years to come.

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18. Sulfur Oxide Control Technology Assessment Panel (SOCTAP), Projected Utilization of Stack Gas Cleaning Systems by Steam-Electric Plants: Final Report to the Federal Interagency Committee, U.S.E.P.A., Research Triangle Park, N.C., Publication No. APTD-1569 (Apr. 1973); and Report of The EPA Hearing Panel, at 67 (n. 14, *supra*). The latter Report notes that flue gas removal equipment will be available for power plant use in amounts that permit its use by 1978 only in new coal fired plants and existing coal fired plants impacting upon primary air quality standards. Equipment will not be available for oil fired plants and other large industrial boilers or to implement time schedules contained in some state implementation plans, at 68.

19. 401 U.S. 402 (1971).

20. 42 U.S.C. §4332(C) (1970).

I

The Decision Below is Inconsistent with the Policy of the Clean Air Act and does not Evidence the Quality of Review Contemplated by this Court's Decision in *Overton Park.*

The facts upon which EPA based the performance standards for fossil fuel fired steam generators cannot withstand the type of comprehensive review contemplated by the *Citizens to Preserve Overton Park Inc.* v. *Volpe* decision,[21] or the standards of review commonly applied to the authorizing functions of other agencies.[22] Section 111 of the Clean Air Act directs EPA to promulgate a standard of performance for categories of stationary sources[23] which reflect "the degree of limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."[24]

Both the Senate and the House agreed, when the Air Quality Act of 1970 was before them, that EPA must base any performance standard on a finding that an affected industry had demonstrated capability to achieve the specified degree of emission control. In this connection, the Senate Report notes that "the Administrator should exam-

21. 401 U.S. 402, 415-416 (1971).

22. *See generally,* Greene County *v.* FPC, 455 F.2d 412 (2d Cir. 1972), *cert. denied,* 409 U.S. 849 (1972); Calvert Cliffs' Coordinating Committee *v.* Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971); and Scenic Hudson Preservation Conference *v.* Federal Power Commission, 354 F.2d 608 (2d Cir. 1965).

23. 42 U.S.C. §1857c-6(b) (Supp. II, 1970).

24. 42 U.S.C. §1857c-6(a)(1) (1970).

ine the degree of emission control which has been or can be achieved through the application of technology which is available or normally can be made available."[25] Similarly, the House Report notes that "in order to be considered 'available' the technology may not be one which constitutes a purely theoretical or experimental means of preventing air pollution."[26]

The Environmental Protection Agency's conclusion that SO_2 stack gas removal systems have been "adequately demonstrated" is not concurred in by either the Federal Power Commission[27] or the President's Council on Environmental Quality[28] and cannot meet the standards prescribed by Congress. As EEI has taken great effort to explain, the fact is that SO_2 removal systems did not in 1971[29] and do not today[30] have the demonstrated capability of achieving the new source performance standards for fossil fuel fired steam generators.

In light of the legislative history of the Clean Air Act, the information upon which EPA relied cannot support any other conclusion. The EPA's own test results made prior to promulgation of the standard indicate that only a single unit approached (rather than achieved) the 1.2 lbs./million

25. S. Rep. No. 91-1196, 91st Cong., 2d Sess., at 16, 17 (1970).

26. H. Rep. No. 91-1146, 91st Cong., 2d Sess., at 10 (1970).

27. Appendix to Petitioner's Brief in the U.S. Court of Appeals for the District of Columbia Circuit, at 71, 74.

28. The Second Annual Report of the Council on Environmental Quality, at 81 (1971). *See also,* The Fourth Annual Report of the Council on Environmental Quality, at 162 (1973).

29. Appendix to Petitioner's Brief in the U.S. Court of Appeals for the District of Columbia Circuit, at 129, 130.

30. *See,* Prepared Statement of W. Donham Crawford, President, Edison Electric Institute, Before the U.S. Senate Committee on Interior and Insular Affairs, at 4 (Nov. 8, 1973).

Btu standard.[31] Such evidence when supplemented by brief references without date to results achieved on prototype units or in pilot studies cannot be held to support a finding that SO_2 stack gas removal technology is "adequately demonstrated".[32] Similarly, reference to the desire of EPA to provide the electric utility industry with "normal incentives" to "advance" SO_2 removal technology, however well-intentioned such "incentives" may be, hardly justifies a conclusion that any technology was, in fact, "adequately demonstrated" in 1971.

Nor is EPA's justification for the availability of stack gas removal technology promoted by references to the guarantees offered by one or more suppliers of SO_2 removal systems. Two such guarantees relate to systems other than the one upon which EPA based its performance standard and a third guarantee must be read in light of the manufacturer's caveat that his system was not commercially proven, had a low scrubbing efficiency "and would be far short of the emission limits for the higher sulfur fuels commonly burned in large steam generators."[33]

Moreover, in light of the enforcement provisions of the Clean Air Act, the oppressive implications of EPA's restrictive Section 111 performance standards upon the capability of the electric utility industry to supply the nation's expanding energy demands become very clear. The failure of an electric utility to operate within such standards on every occasion would risk the possibility of injunc-

31. Petitioner's Brief in the U.S. Court of Appeals for the District of Columbia Circuit, at 49; and Appendix to Petitioner's Brief, at 53.

32. *Id.*, at 48 and 53, *respectively*.

33. Petition for Rehearing and Suggestion for Rehearing In Banc in the Court of Appeals for the District of Columbia Circuit, at 11; and Appendix to Petitioner's Brief in the U.S. Court of Appeals for the District of Columbia Circuit, at 171.

tive action by EPA pursuant to Section 113(a)(3) of the Clean Air Act,[34] a fine of $25,000 per day of violation or imprisonment for up to one year, or both, pursuant to Section 113(c)(1)(C),[35] and civil suit by any citizen pursuant to Section 304(a)(1).[36] Any assumption that EPA would or could[37] refrain from prosecuting utilities that have installed expensive[38] but unproven SO_2 removal equipment is unfounded and offers the electric utility operator or the nation cold comfort indeed.

II

The Relationship Between the Regulatory Activities of EPA and the National Environmental Policy Act of 1969 Should be Clarified as Should the Obligations of EPA Under the Clean Air Act of 1970

The NEPA/EPA issue (that is, whether or not EPA must comply with the statutory dictates of the National Environmental Policy Act of 1969)[39] is presented boldly in this case.[40] If the decision below and others of a similar

34. 42 U.S.C. §1857c-8(b) (Supp. II, 1970).

35. 42 U.S.C. §1857c-8(c)(1) (Supp. II, 1970).

36. 42 U.S.C. §1857h-2 (1970).

37. In any event, pursuant to Section 304(b), 42 U.S.C. §1857h-2(b) (1970), if the EPA has not commenced or is not diligently prosecuting an action 60 days after a notice of violation by a citizen/plaintiff, the citizen may commence a civil action on his own behalf.

38. Report of The EPA Hearing Panel, at 55, 56 (n. 14, *supra*).

39. 42 U.S.C. §4321 *et seq.*, Pub.L.91-190, 83 Stat. 852 (1970).

40. It appears that lower courts have had considerable difficulty in resolving the issue of the applicability of NEPA. *For example, compare:* Kalur *v.* Resor, 335 F.Supp. 1, 15 (D.D.C. 1971) (the Court holding that NEPA applies to all Federal agencies including the Army Corps of Engineers when administering the Rivers and

nature are permitted to stand, EPA will be the only Federal agency exempted by judicial decree and not by Con-

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Harbors Act of 1899); Cohen *v.* Price Commission, 337 F.Supp. 1236, 1241 (S.D.N.Y. 1972) (the Court deciding that NEPA does not apply to the Price Commission in administering the Economic Stabilization Act); Environmental Defense Fund *v.* Hardin, 325 F.Supp. 1401, 1407 (D.D.C. 1971) (the Court concluding that NEPA applies to the Department of Agriculture in administering the Federal Insecticide, Fungicide, and Rodenticide Act); Environmental Defense Fund *et al. v.* E.P.A., 6 E.R.C. 1112 (D.C. Cir. Nos. 72-1548 *et al.*, Dec. 13, 1973) (the Court ruling that EPA was exempt from NEPA when administering the Federal Insecticide, Fungicide, and Rodenticide Act); Sierra Club *v.* Sargent, 2 E.L.R. 20131 (Civil No. 249-71 C2, W.D. Wash. Mar. 16, 1972) (the Court holding that NEPA applied to the Army Corps of Engineers in administering the Rivers and Harbors Act of 1899); Getty Oil Company (Eastern Operations) *v.* Ruckelshaus, 342 F.Supp. 1006, 1020-1021 (D. Del. 1972) (the Court ruling that NEPA applies to EPA in administering the Clean Air Act); Getty Oil (Eastern Operations) *v.* Ruckelshaus, 467 F.2d 349, 359 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (the Court overruling Getty Oil, *supra*, and finding that NEPA did not apply to EPA when administering the Clean Air Act); Gibson *v.* Ruckelshaus, 1 E.L.R. 20337, 20338 (Civ. Ac. No. 5255, E.D. Tex., Mar. 1, 1971) (the Court deciding that NEPA applied to EPA in administering the Water Pollution Control Act); City of Lufkin, Texas *v.* Gibson, 447 F.2d 492 (5th Cir. 1971) (the Court overruling Gibson, *supra*, on other grounds); Anaconda Company *v.* Ruckelshaus, 352 F.Supp. 697 (D.Colo. 1972) (the Court concluding that NEPA applied to EPA when administering the Clean Air Act); Anaconda Company *v.* Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973) (the Court reversing Anaconda, *supra*, and finding that NEPA does not apply to EPA in administering the Clean Air Act); International Harvester Company *v.* Ruckelshaus, 478 F.2d 615, 650 (D.C. Cir. 1973) (the Court stating, in effect, that NEPA does not apply to EPA in administering the Clean Air Act); Appalachian Power Co. *v.* Environmental Pro. Agcy., 477 F.2d 495, 508 (4th Cir. 1973) (the Court stating that NEPA does not apply to EPA in administering the Clean Air Act); Portland Cement *v.* Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) (the Court holding that NEPA does not apply to EPA when administering the Clean Air Act); Duquesne Light Co. *v.* Environmental Protection Agcy., 481 F.2d 1, 9 (3d Cir. 1973) (the Court noting that NEPA does not apply to EPA in administering the Clean Air Act); and Buckeye Power, Inc. *v.* Environmental Protection Agcy., 481 F.2d 162, 174 (6th Cir. 1973) (the Court holding that NEPA does not apply to EPA in administering the Clean Air Act).

gress from compliance with NEPA.[41] Whatever may be the language and the legislative history of the Federal Water Pollution Control Act of 1972,[42] the legislative history upon which EPA relies is far too slim,[43] EEI submits,

41. International Harvester Co. *v.* Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Portland Cement Association *v.* Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); Environmental Defense Fund *et al. v.* E.P.A., 6 E.R.C. 1112 (D.C. Cir. Nos. 72-1548 *et al.*, Dec. 13, 1973).

42. 33 U.S.C. §1151 *et seq.*, Pub.L.92-500, 86 Stat. 816 (Oct. 18, 1972). Pursuant to Section 511(c), 33 U.S.C. §1371(c) (Supp. II, 1970), Congress expressly exempted EPA from NEPA requirements for carefully specified portions of the Act: "(c)(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 201 of this Act, and the issuance of a permit under section 402 of this Act for the discharge of any pollutant by a new source as defined in section 306 of this Act, no action of the Administrator taken pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852); and (2) nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to— (A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this Act or the adequacy of any certification under section 401 of this Act; or (B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this Act."

43. *Compare,* Statements of Senators Jackson and Muskie, 115 Cong. Rec. 40417, 40418 and 40423 (1969) with Statement of Senator Allott, 115 Cong. Rec. 40422 (1969). ***See also,*** Statement of Administrator Ruckelshaus during the NEPA Oversight Hearings: Joint Hearings Before the Senate Committees on Public Works and Interior and Insular Affairs on the National Environmental Policy Act, 92d Cong., 2d Sess., at 564 (1972). ***Note that,*** The Council on Environmental Quality ("CEQ") initially issued regulations which stated that EPA should not have to prepare impact statements for "environmental protection regulatory activities," 36 Fed. Reg. 7725 (Apr. 23, 1971). However, recently the CEQ has revoked this interpretation in its revised NEPA Guidelines. 40 C.F.R. § 1500.4, 38 Fed. Reg. 20550 (Aug. 1, 1973); for an explanation of the revocation, *see* 38 Fed. Reg. 10856, 10865 (May 2, 1973).

to base an exemption from compliance with the express language of Section 102(C) of NEPA.

Nevertheless, should it be thought that the National Environmental Policy Act does not apply, then the Clean Air Act as a whole and, in particular, Section 111 when properly construed, requires EPA in the performance of its regulatory obligations under that Act to prepare, as has sometimes been held, "the functional equivalent of a NEPA Impact Statement" and requires the courts to test such actions in light of that responsibility.[44] Edison Electric Institute submits in short that EPA cannot free itself from the obligations of NEPA and, as well, the obligations to make an analysis which is the functional equivalent of a NEPA analysis pursuant to the Clean Air Act.

Moreover, EEI believes that such analysis is particularly important in light of existing technology which may be implemented now and which promises substantial progress toward achieving ambient air quality standards in timely fashion. What should have been done by EPA was to develop a uniform plan (consistent with the over-all policy of the Clean Air Act to eliminate hazards to public health attributable to air pollution within three years of the adoption of a state implementation plan) which: (1) allocates the short supply of low sulfur fuels to some plants, where land restrictions, plant age, and population density preclude use of other methods; (2) permits other plants to solve the primary and secondary air quality standard problems presently and often forever with high stack technology; and (3) perhaps obligates some plants, where no other solution is available, to use stack gas removal systems when such systems have, in fact, been "adequately demonstrated".

44. International Harvester Co. *v.* Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Portland Cement Association *v.* Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).

At such time, because the use of tall stack technology is much less expensive than the use of scrubber systems,[45] it may be appropriate consistent with Section 111 of the Clean Air Act to consider cost.[46] These costs are estimated to be $400 in annual environmental incremental costs per family each year after 1980.[47]

CONCLUSION

For the reasons stated the Petition for Certiorari should be granted.

Respectfully submitted,

CAMERON F. MACRAE
LeBoeuf, Lamb, Leiby & MacRae
One Chase Manhattan Plaza
New York, New York 10005
Attorney for
Edison Electric Institute

Of Counsel
JAMES H. DURAND

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45. Report of the EPA Hearing Panel, at 55, 56 (n. 14, *supra*).

46. *Id.* For example, it is estimated that the scrubbing of 90,000 megawatts of generation needed by 1980 to meet primary standards amounts to an investment of about $5.4 billion. Additionally, the costs of installing and operating flue gas desulfurization systems will ultimately result in increased costs to the consumer. In this connection, it is estimated that consumer rates on some utility systems could increase by as much as 15-20 percent annually.

47. Department of Health, Education and Welfare, Staff Paper Prepared As Background For Official DHEW Comments On The Environmental Protection Agency's Proposed Rulemaking On Prevention Of Significant Air Quality Deterioration, at 17 (Oct. 1973).